United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit of mailing

75-1022

To be argued by
CHARLES E. CLAYMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1022

UNITED STATES OF AMERICA,

Appellee,

—against—

ENRIQUE HERNANDEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Appellant, Enrique Hernandez, appeals from a denial by District Judge Jack B. Weinstein of the Eastern District of New York, of his motion for a new trial on the grounds of newly discovered evidence, after a hearing held on November 15, 1974.

On December 20, 1971, the appellant, and eight other individuals were convicted after a jury trial, before Judge Weinstein, of conspiring to smuggle and traffic in cocaine in violation of Title 21, United States Code, Sections 173 and 174.* Appellant was sentenced by Judge Weinstein to fifteen years imprisonment and a twenty thousand dollar ($20,000) fine. Appellant's conviction was affirmed by this Court in open court. See, *United States* v. *Borrone-Iglar*, 462 F.2d 574 (1972). He is presently incarcerated.

* The Government's appendix contains the statement of facts which was part of the Government's brief filed in the appeal of appellant's conviction (G.A. 135-151).

Statement of the Case

A. Appellant's Motion for a New Trial

On July 18, 1974, the appellant personally caused to be filed in the Eastern District of New York an affidavit in which he requested a new trial (G.A. 1-3). That affidavit was supplemented by a notice of motion and an affidavit sworn to by appellant's attorney, Joseph I. Stone, dated September 27, 1974 (G.A. 4-9), and a letter by appellant's attorney dated November 12, 1974 (G.A. 10-11). In those documents, appellant contended that certain unspecified illegal wiretapping activities of New York City Police Detectives, which had recently been publicized, had somehow affected the wiretap evidence which was offered against him at his trial, and, thus, tainted the proceedings. He did not contend that he had discovered any evidence that would establish his innocence, nor did he offer any specific evidence that the wiretaps in the instant case were illegally obtained. Relying upon generalities, the appellant sought a new trial based upon this "newly discovered evidence."

B. The Hearing

On November 15, 1974, Judge Weinstein conducted a hearing in this matter. James Sotille, Detective Owen Brodeur and the appellant testified at this hearing as to the following facts:

1. Mr. Sotille testified that he had engaged in illegal wiretapping activities during the months of September and part of November 1970 at the Chile-Lindo restaurant in Manhattan (G.A. 18). This wiretapping had no relation to the appellant or to any of his co-conspirators (G.A. 21, 22, 26). The appellant was never seen at the restaurant nor was he ever mentioned in connection with the wiretap (G.A. 19, 21). Sotille did not know or work with Detective Brodeur, Cruet or Tuckett, the detectives assigned to appellant's investigation, nor was he aware of their investigation (G.A.

28-29, 41). Moreover, he was unaware of the court authorized wiretap being conducted upon Enrique Hernandez. In response to the Court's question: "Did any of the information that you had result in the wiretap that was used in this case?" Sotille responded: "No, I have no knowledge of that team's activities or these people" (G.A. 32).

2. On September 10, 1970, Sotille received "sketchy information" over the illegal wiretap concerning a room number at the Century Paramount Hotel. As a result of observations made while he was at the hotel, he recognized two individuals he knew to be drug traffickers. After further observation and investigation, he subsequently made a seizure of narcotics from a third individual, Gilberto Pascual.* Sotille said he lied at the pretrial suppression hearing when he testified that a confidential informant gave him the information which led him to the Century Paramount (G.A. 26, 38, 42). (He was not asked at trial what led him to the hotel).

3. Detective Brodeur, who maintained the court authorized wiretap upon the telephone of Enrique Hernandez, was unaware of the illegal wiretap being conducted by Sotille, and only became aware of its existence during preparation for the present hearing. He never discussed his investigation of Enrique Hernandez with Sotille until after appellant's indictment (G.A. 50-52).

4. In his testimony at the hearing, appellant claimed that he and his codefendants made frequent telephone calls to and from the Chile-Lindo restaurant in September of 1970 concerning narcotics-related activity (G.A. 57).

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* Nicodemus Olate-Romero (Olate) and Justo Quintinella were the two individuals that Sotille had earlier recognized. They were with Gilberto Pascual when Sotille seized the narcotics. (See trial testimony of Sotille at G.A. 66-105, 122-134). Olate and Quintinella were indicted with appellant but were fugitives at the time of trial. Pascual, the individual from whom the narcotics was seized, was not a co-defendant or co-conspirator of appellant.

C. The Findings of the Court

The District Court made the following statements and findings at the conclusion of the hearing: (1) "[In] my opinion the defendant was tried fairly and the evidence was overwhelming" (G.A. 59); (2) "I'm going to do anything with the case on the basis of what I have. The whole thing is too tenuous. Whatever we have had here, and it's very slight, would be cumulative" (G.A. 61); (3) "there are all these rumors floating around in jail. I can't retry cases four years later on the basis of this kind of information. * * * Anything I heard today would have produced not the slightest difference at the trial" (G.A. 61); (4) "nothing that I heard here would have affected my decision, and nothing that I heard here would have affected the jury's decision" (G.A. 61); (5) "that's why they require a very heavy burden before a new trial can be granted. We can't retry these things over and over again. * * * The defendant, I thought, had a very fair trial. He was convicted out of his own mouth; his wiretaps were very convincing; and the wiretap that we had in the case and that was introduced was legally obtained. There is no indication to the contrary" (G.A. 63); (6) "I simply am not going to call in a whole series of witnesses on the basis of what you have shown here. It's just too tenuous" (G.A. 63); (7) "these seem to me to be stabs in the dark. There is information now abroad that a number of people involved in narcotics control were crooks. That is not the basis for setting aside every one of these verdicts and going into background on each of them. There's no indication here of any connection. * * * I'm sorry. I haven't the slightest doubt of Mr. Hernandez's conviction on the basis of the evidence we had. Thank you very much. Motion denied" (G.A. 64).

ARGUMENT

The District Court Properly Denied Appellant's Motion for a New Trial.

Appellant contends that a new trial is required in his case and that the District Court improperly failed to recognize the necessity of such a new trial. Appellant's contention is based upon one fact which the Government does not dispute. That fact involves Detective Sotille's false testimony concerning the source through which he had learned of narcotics activities at the Century Paramount Hotel, which eventually led to his seizure of narcotics from Gilberto Pascual, an individual who was neither a co-conspirator nor co-defendant of appellant.

Under recognized standards covering the granting of a new trial, we believe that appellant's contention is without merit. Initially, however, we would note that Detective Sotille's concededly false testimony was not elicited at the trial, but simply at a suppression hearing in which appellant had no standing whatever.* In addition, we would

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* Appellant was not on the premises at the time of the contested search and seizure, he had no proprietary or possessory interest in the premises and he was not charged with an offense which included, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure (G.A. 66-105, 122-134). *Brown* v. *United States*, 411 U.S. 223, 239 (1973). See also *United States* v. *Tramunti*, — F.2d — (2d Cir. slip opinion, 2107, 2124 n. 18; March 7, 1975); *United States* v. *Capra*, 501 F.2d 267 (2d Cir. 1974) and *United States* v. *Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973).

Similarly, the appellant lacks standing to object to the illegal wiretap which was conducted at the Chile-Lindo Restaurant for there is no evidence that appellant's conversations were intercepted over the illegal wiretap. Not being an aggrieved party under 18, U.S.C. § 2510(11) he, *thus*, would have no standing to object to the intercepted conversation which led Sotille to the Century Paramount Hotel; "Co-conspirators and co-defendants have been accorded no special standing" (*Alderman* v. *United States*, 394 U.S. 165 (1968).

also preface our main remarks by observing that all of the wire tap evidence admitted at appellant's trial was legally obtained.* Finally, the cocaine seized from Pascual was not (as appellant would apparently have this Court believe) the only tangible narcotics evidence introduced at the trial. The co-conspirator and witness Sepulvedo, and the co-defendants Pineda and Victor and Martin Hernandez were arrested in possession of four kilograms of cocaine, all of which was introduced at the trial (G.A. 106-120).

It is settled that: "[a] motion for a trial based on newly discovered evidence is addressed to the discretion of the trial court . . . It is not favored and should be granted only with great caution . . . and only when it is evident that the trial judge has abused his discretion." *United States* v. *Sposato,* 446 F.2d 779, 781-782 (2d Cir. 1971) see also (*United States* v. *Lombardozzi,* 343 F.2d 127 (2d Cir.), *cert. denied,* 381 U.S. 938 (1965). Judge Weinstein, employing that standard, concluded that "[a]nything I heard today would have produced not the slightest difference at the trial . . . nothing that I heard here would have affected my decision, and nothing that I heard would have affected the jury's decision." (H. 50).

Appellant seeks to have the Court overturn Judge Weinstein's findings because Judge Weinstein "erred". He ignores the established law. "[I]t is not the province of this Court or the Circuit Court of Appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court

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* Appellant states that if the jury knew of the illegal wiretaps they would, perhaps, have called into question all wiretaps. This is utter persiflage. The only wiretap evidence that was before the jury was the court authorized wiretaps of the defendants Pineda, Miller and the appellant. There was, and is, no connection between these wiretaps and the illegal tap operated by Sotille. Therefore, under no circumstances would the evidence of Sotille's activities have been before the jury.

made erroneous findings of fact". *United States* v. *Johnson*, 327 U.S. 106, 111 (1946).

The appellant, in urging that the adoption of a rule that "no criminal conviction can be sustained when any perjured testimony is offered by the Government," would thereby have this Court usurp the province of the District Court judge and ignore the long established test of *Larrison* v. *United States*, 24 F.2d 82 (7th Cir. 1928). That test holds that a new trial should be granted when (a) the Court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it the jury might have reached a different conclusion; and (c) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

In the instant case, Sotille was not a material witness against the appellant. Appellant had no standing to object to the cocaine that was seized and, in fact, Sotille offered no evidence against appellant. As Judge Weinstein found, "whatever we have had here, and it's very slight, would be cumulative." Judge Weinstein further held that nothing brought out at the hearing would have affected the jury's decision . . . I haven't the slightest doubt of Mr. Hernandez' conviction on the basis of the evidence we had . . . the evidence was overwhelming" (G.A. 50, 53, 48).

Judge Weinstein, the trial judge, was fully familiar with the case; and he permitted appellant a full hearing on the motion for a new trial. There is no basis for overturning his denial of the motion. "While the appellate court might intervene when the findings of fact are wholly unsupported by evidence . . . it should never do so where it does not clearly appear that the findings are not supported by the evidence". *United States* v. *Johnson*, *supra*, 111-117.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

March 21, 1975

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of March 19 75 he served ~~a copy~~ two copies of the within BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Joseph I. Stone, Esq.
277 Broadway
New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
21st day of March 19 75

Irene B. Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0603965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975